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Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT E. YOUNG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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QUESTIONS PRESENTED

1. Are there any limits, in a criminal case, to a trial court's discretion to exclude evidence offered by the defendant which is clearly admissible and relevant.

2. Is it a defense to a charge under 26 U.S.C. Section 7206(1) (the "tax perjury" offense) that the alleged omitted income was substantially (97-½ %) reported through a "netting" process in which expenses were netted against income. The trial court instructed the jury to the contrary by stating that a taxpayer had the obligation to report gross receipts to permit the IRS to verify the data on a tax return.

3. The defense contended, at trial, that the defendant's bail bonding business was operated as a sole proprietorship. If this was true the government had no case. In a prior proceeding involving the same time frame the Deputy Chief of the Appellate Section, Department of Justice, Criminal Division, stated in a brief to the Court of Appeals to the Eighth Circuit,

"Appellant Bob Young is the owner of an unincorporated bail bonding business****".

Did the trial court deny Young a fair trial by denying his attempt to elicit that admission from that attorney.



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The taxpayer petitions for a writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals entered on October 29, 1986 is officially reported at 804 F.2d 116. A timely petition for rehearing with a suggestion for rehearing en banc was denied by the court below on January 5, 1987.

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit on October 29, 1986 serves as the final order or judgment. The

time for filing a Petition of Certiorari will expire on March 6, 1987 because a timely petition for rehearing was filed and not denied until January 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

26 U.S.C. Section 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or ***

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

STATEMENT

Three issues are presented in this Petition for Certiorari. The statement below describes them in the sequence set forth in the questions presented.

I

Are There Any Limits In A Criminal Case To A Trial Court's Discretion To Exclude Evidence Offered By The Defendant Which Is Clearly Admissible And Relevant.

At trial the government sought to reconstruct the income of a corporation, Bob Young Agency & Realty, Inc. and corresponding business expenses in order to establish that the operation of Young's bail bond business was profitable. The defense ob-

jected to the computation on the basis that it was fragmentary inasmuch as the Internal Revenue Service did not deduct all the checks written on the bail bonding bank account when they could not identify the nature of the payment. The government's exhibit was received establishing a significant amount of what the government contended to be taxable income. (tr. 916)

After the government rested its case the defendant attempted to introduce evidence establishing that the bail bond business lost money for a period of time covered by the indictment. An expert witness, one Mark Larson, CPA, who was a former revenue agent, had prepared an exhibit establishing a loss of approximately \$500 from bail bonding. The government objected to the admission of the exhibit on the grounds of relevancy and lack of foundation. (tr. 994) The exhibit was an analysis of the bank statements and checks drawn on the pertinent bank account which had already been introduced into evidence by the government. The Trial Court sustained the government's objection and refused the admission of the exhibit. (tr. 1274) At the time the case went to the jury the government's exhibit establishing a significant amount of income was in evidence and the defendant had no exhibit to counter it.

To make matters worse, in closing argument to the jury counsel for the government ridiculed the defense's contention that the bail bond business was not profitable by belittling the defense's failure to obtain such testimony from an accountant rather than an analysis by counsel for Young. (tr. 1429)

In upholding the Trial Court on this issue the Court of Appeals relied upon the doctrine that it will reverse a district court's decision to exclude evidence only if the district court has abused its discretion. However, the Court of Appeals did not make further inquiry and merely held that it felt that the Trial Court was in a better position than it to weigh the relevance of the document, thereby affirming the lower court's action.

II

Is A Taxpayer Guilty Of An Offense Under 26 U.S.C. 7206(1) For Reporting Gross Receipts And Expenses By A Netting Process.

During the trial of this case the government contended that Young's bail bond income was corporate rather than personal income. No category of income labeled, "Bail bond income" was reported on the corporation's tax return but virtually all of the gross income of the bail bond business was "netted out" into an account entitled, "commissions". The government contended that some \$404,000 of bail bond gross income had been omitted but through the netting process it was established that of some \$395,000 had in fact been reported. (Ex. 63-65; tr. 702, 703) The netting out process was one which was performed by the accountants without any knowledge on the part of the defendant. (tr. 704) Our phrase "netting out" simply means that from gross receipts the expenses of the bail bond business were subtracted and the net amount was included under an account entitled "commissions" on the tax return. This fact was apparently not known to the government prior to trial. On this issue the Trial Court instructed the jury as follows:

"The materiality of the alleged false statements pertaining to gross receipts charged in the indictment is a question for the court to decide. You are instructed that the alleged false statements pertaining to gross receipts charged in the indictment, if proven beyond a reasonable doubt, are material, *in that statement pertaining to the taxpayer's gross receipts are essential for ascertaining or verifying the correctness of the tax declared in an income tax return.*" (Emphasis supplied)

It was the position of the defense that the later part of the instruction which is italicized above was improper and misleading in that it indicated that in a criminal action a taxpayer who nets his gross receipts and expenses could be guilty of

a crime, even though the information reported was true and correct.

III

Did The Trial Court Err In Refusing To Permit The Defense To Elicit An Admission Made By Counsel For The Government.

As part of the intitial investigation the government sought to obtain Young's books and records pertaining to the bail bond business and caused a Grand Jury search warrant to be issued. That warrant was challenged, ultimately resulting in a decision of the Eighth Circuit holding the warrant invalid. *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983).

After the records had been seized by agents of the Internal Revenue Service Young sought their return under Rule 41(e), Federal Rules of Criminal Procedure. That rule provides, in pertinent part:

“A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property seized for the return of the property on the ground that he is entitled to lawful possession of the property which is illegally seized.***”

Bob Young personally sought the return of his records and in the trial court the government challenged whether the records were corporate or personal by stating:

“***A particular problem arose when cooperation of Mr. Young was requested by various means and with regard to the records that the search warrants were obtained for. Mr. Young informed the United States, either directly or through his attorney, that these records of Bob Young Bonding Company were of a personal nature and thus, he would not turn them over to agents of the United States in this case. *Investigation indicated that Mr. Young on many occasions had signed as president of Bob Young Bonding*

Company. He further on occasion held himself out to be an attorney in fact of Bob Young Bonding Company."
(Emphasis supplied)

The trial court in its opinion upholding the search warrant stated:

"Appellant Robert Young operates five separate businesses, one of which is the Bob Young Bonding Company, an unincorporated bail bonding business in Fargo, North Dakota."

Young appealed that case; in its brief before the Eighth Circuit. The government again contended the records were corporate, stating:

"Young's cooperation was requested in producing the records needed; Young refused, informing the United States either directly or through his attorney that the records of the Bob Young Bonding Company were of a personal nature. *However, the investigation indicated that Young on many occasions had signed as president of Bob Young Bonding Company and on occasion professed to be an attorney-in-fact of Bob Young Bonding Company.*"
(Emphasis supplied)

The Court of Appeals reversed the trial court and held that the search warrant should be suppressed and the records returned. The government filed a petition for rehearing and in that petition Robert J. Erickson, Deputy Chief, Appellate Section, Criminal Division, Department of Justice stated: (p. 2)

"***Appellant Young is the owner of an unincorporated bail bonding business (Bob Young Bonding Company)***"

We sought to subpoena Mr. Erickson to introduce that admission. The government moved to quash the subpoena and, based upon Young's counsel's statement that the purpose of the

subpoena was to elicit that admission the trial judge granted the government's motion. (tr. 371, 372) The Court of Appeals found no error contending that the government was merely restating information not in contention in the prior proceeding. As is apparent from the portions of the government's briefs quoted above the government most assuredly did contend that the Bob Young Bonding Company was a corporate entity not only in the trial court but also in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

A charge under 26 U.S.C. 7206(1) is essentially for tax perjury. The gist of the crime is the filing of a tax return which a taxpayer does not believe to be true and correct in every material respect. The defendant was Robert Young (hereinafter "Young"). The returns were those for a corporation, Bob Young Agency & Realty, Inc., for the fiscal years ended September 30, 1978, 1979, 1980 and 1981, inclusive.

Young signed these tax returns as the corporation's president.

1.

In an effort to prove motive the government attempted to show that the corporation had omitted gross income from Young's bail bonding business, that the income was substantial, that after an allowance for certain deductions the taxable income would be positive and that the tax liability would be of a substantial amount. The foundation for the evidence was certain documents and records of the corporation together with canceled checks and bank statements.

The defendant attempted to counter this evidence by calling Mark Larson, a CPA and former revenue agent who was prepared to testify that for a period of time contained in the indictment years the bail bond business was not profitable. This too went to motive. *United States v. Taylor*, 574 F.2d 232 (5th Cir. 1978). The trial court refused to admit the expert's testimony and exhibits on the basis of relevancy and lack of foundation. (tr. 1274) The Court of Appeals in upholding the trial court's ruling committed, we submit, two serious errors, both of which could seriously effect the administration of justice in this and any other criminal case.

The Court of Appeals upheld the trial court's reversal essentially because of the well known rule that a court will reverse a district court's decision to exclude evidence only if the district court has abused its discretion. (App. p. 7) The Court of Ap-

peals, however, demonstrated that it did not inquire into the relevancy of the offered testimony, although, to even a first year law student, the evidence appears to be not only relevant, but crucial to the defendant's case. Instead the Court of Appeals deferred to the trial court stating that since the trial court permitted extensive argument concerning the admissibility of the evidence the trial court was in a better position to rule on the question.

If this is the standard for the administration of justice in criminal cases we suggest that a defendant in a criminal case simply has no chance for any significant review of evidentiary errors made in the court below. Such a position is contrary to the decisions of many other circuits. The Eighth Circuit decision here is contrary to that expressed by the Ninth Circuit in a recent case also involving a prosecution under 26 U.S.C. Section 7206(1). *United States v. McLaughlin*, 663 F.2d 949 (9th Cir. 1981). In that case the Court of Appeals for the Ninth Circuit did not defer to the trial court's exercise of broad discretion on relevancy and foundational issues when it reversed a trial court's ruling excluding evidence offered by the defense to counter a statement made by a witness for the government. This is precisely the situation that was presented here and creates a potential conflict of the law in tax and, for that matter, all criminal cases in the federal system.

Young's right to a meaningful appeal on this crucial issue was denied by the Court of Appeals when it decided:

- a) The trial judge has wide discretion in ruling on evidentiary matters, and
- b) Since the case was complex and the defendant was given an opportunity to argue for the admissibility of the evidence the trial court was in a better position to determine the issue than the Court of Appeals.

This result simply put, means Young had to review of this issue.

2.

When a taxpayer files a return which is not true in every material respect he can be prosecuted under 26 U.S.C. 7206(1). Young reported 97-½ % of the gross income from the bail bonding business through a netting out process that was caused by an error on the part of his accountants. (Ex. 63-65; tr. 702, 703) This "netted amount" was reported on the corporate return under a different category. (tr. 704) There was no suggestion at trial that the "netting out" method was in any way could be traced backed to the actions of Young and was, in fact, admitted to be the work of the accountants. (tr. 704)

Two of the defendant's witnesses, both certified public accountants, testified that the income of the bonding company had been reported to the Internal Revenue Service by virtue of the netting process.

The trial judge instructed the jury, over the objection of Young's counsel as follows:

"The materiality of the alleged false statements pertaining to gross receipts charged in the indictment is question for the court to decide. You are instructed that the alleged false statements pertaining to gross receipts charged in the indictment, if proven beyond a reasonable doubt, are material, in that statements pertaining to the taxpayer's gross receipts are essential for ascertaining or verifying the correctness of the tax declared in an income tax return."

To explain our position here, and the mischief that flows from the government's position in this case, we must utilize an example. For simplicity assume a taxpayer has but one transaction during the year; he sells a tract of land for \$100,000 which cost him \$40,000 and realized a gain of \$60,000. On his return he reports the gain of \$60,000, omitting the listing of his gross receipts and basis.

Under the court's instructions the netting out described above could subject him to criminal prosecution under Section 7206(1), IRC. The trial court's instructions to the jury that a taxpayer's gross receipts are essential for ascertaining or verifying the correctness of the return is a direct statement, to the jury, that the mere failure to list gross receipts is, in itself, a material misstatement.

If the trial court's instruction is a correct statement of the law the Internal Revenue Service could prosecute literally hundreds of thousands of taxpayers who have otherwise believed their returns to be true and correct, for the netting out process in filing complex tax returns is, in today's world, a very common process. Moreover it violates the fundamental purpose of 26 U.S.C. 7206(1), inasmuch as it is intended to be a perjury statute. In the example described above the taxpayer in reporting \$60,000 of income has not told a lie yet, under the trial court's instructions, he could still be prosecuted for tax perjury.

3.

Our third issue concerns primarily an issue of the application of the Rules of Evidence. A crucial issue at trial was the nature of Young's bail bond business, i.e., was it personal or corporate. In a prior proceeding involving the same time frame Robert Erickson a Deputy Chief of the Appellate Section, Criminal Division, Department of Justice stated in a brief to the Eighth Circuit:

“Appellant Young is the owner of an unincorporated bail bonding business (Bob Young Bonding Co.)***”

Young's counsel sought to subpoena Erickson to elicit the admission. The government moved to quash the subpoena and the trial court granted the government's motion. The trial court gave as its reasons that he did not deem the statement to have “trustworthiness” (tr 371, 372), and that the record did not show whether the bail bond business was incorporated or not was a fact within the knowledge of Erickson.

We emphasize that this is a criminal case; the Federal Rules of Evidence, specifically Rule 801(d)(2) clearly permits the introduction of admissions. The Advisory Committee's notes under Rule 801 states:

“***No guarantee of trustworthiness is required in the case of an admission.***”

Moreover the leading commentator on Evidence, Wigmore, states in Wigmore on Evidence, 4th Edition (1972), Section 1053:

“that the personal knowledge of a person making an admission is immaterial to its receipt in evidence”.

It is clear that the lower courts have recognized that the statements made by an attorney for a defendant are admissible against their clients. See, for example, *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976); *United States v. McKeon*, 738 F.2d 26 (2nd Cir. 1984). The significance of the admission in this case is that it was made by a government attorney. The government has utilized, in many cases, as it did in *Ojala, supra*, and *McKeon, supra*, statements made by counsel for private citizens. Here the government should be subject to the same rules and its statements made by its attorneys should similarly be admissible when offered by the defense.

CONCLUSION

The petition for writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 85-5211

United States of America,
Appellee,

v.

Robert E. Young,
Appellant.

Appeal from the United States
District Court for the
District of North Dakota.

Submitted: February 14, 1986

Filed: October 29, 1986

Before LAY, Chief Judge, and ROSS and WOLLMAN, Circuit
Judges.

WOLLMAN, Circuit Judge.

Robert E. Young was convicted by a jury of filing false corporate income tax returns for the years 1978 through 1981. See 26 U.S.C. § 7206(1) (1982). He argues on appeal that the government's theory of the crime—that Young understated

gross income by omitting from his corporate returns most of the income from his bail bonding company—was foreclosed by an earlier court decision that the bail bonding operation was a personal business and not part of Young's corporation. In addition, Young asserts that he made no material misstatements within the contemplation of section 7206(1) because the bail income actually was reflected on his corporate returns, albeit in the form of net rather than gross income. We affirm.

A grand jury in 1982 began investigating various aspects of Young's business affairs. Pursuant to this investigation, a magistrate issued a search warrant for the office of Young's bail bonding business, and agents executing the warrant seized sixteen boxes of records. Young filed a motion under Rule 41(e) of the Federal Rules of Criminal Procedure seeking the return of these records, and he eventually obtained relief when a panel of this court held the warrant invalid as authorizing a general search and as having been issued in the absence of probable cause. *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983). Young argues that those warrant proceedings resulted in a judicial determination that his bonding business was personal rather than corporate and that the doctrine of collateral estoppel precluded relitigation of that issue in the present case, thus foreclosing the government's theory of prosecution.

The doctrine of collateral estoppel prevents litigation of an issue when the identical issue was actually litigated in and necessary to the decision in a prior proceeding concluded by a valid and final judgment. *Lovell v. Mixon*, 719 F.2d 1373, 1376 (8th Cir. 1983). Young argues that this court decided that his bonding business was personal rather than corporate when, in summarizing the facts in the Rule 41(e) proceeding, it stated, "Appellant Robert Young operates five separate businesses, one of which is the Bob Young Bonding Company, an unincorporated bail bonding business in Fargo, North Dakota." *In re Grand Jury Proceeding*, 716 F.2d at 494. In addition, Young points to the following passage in the same opinion:

Finally, the Government suggests that this case presents no constitutional problem because it did not rummage in a *person's* belongings; rather, the records of a company were searched. Since the Young Bonding Company was not incorporated, the records were really Young's personal records. Moreover, there is neither authority nor reason to support the Government's position that a less exacting standard of constitutionality applies to the search of business records. See *United States v. Roche*, [614 F.2d 6, 7 n.2 (1st Cir. 1980)].

716 F.2d at 499 (emphasis in original).

Given the context in which the former statement was made, it cannot reasonably be contended that the court was making a binding finding of fact. The government in defending its search warrant had no need to contest Young's characterization of the status of his bonding business and offered no evidence on the issue, and the court's adoption of the language in Young's brief in reciting the background to the case was in no way necessary to the decision on probable cause or the specificity of the warrant. The outcome would have been the same absent any reference at all to the corporate or personal status of the bail bonding business.

Similarly, the government's argument in the second passage cited above was that a search warrant directed to business records in general should be subject to a less exacting scrutiny than a search warrant addressed to other types of objects. The distinction relied on was not, as the citation to *Roche* makes clear, between corporate and personal business records. The panel's comment regarding the bail bonding company's unincorporated status again was not essential to the disposition of the case.

Young, however, further argues that the court in considering the validity of the search warrant implicitly and of necessity had to have decided that the bail bonding company was a personal

rather than a corporate business because Rule 41(e) requires that a person making a motion for return of property be "entitled to lawful possession of the property which was illegally seized." Thus, Young asserts, a motion for the return of corporate records would have had to be brought by the corporation itself. Because he brought his Rule 41(e) motion individually and the court considered the merits of his fourth amendment argument, Young contends, the court must have found that he operated the bail bonding business individually.

Assuming for the purposes of this discussion that Young's interpretation of the requirements of Rule 41(e) is correct, we see no evidence that the government defended against Young's motion on that basis. Young's authority to bring the motion was not so much implicitly decided as it was stipulated or conceded by the government. Collateral estoppel, in contrast to res judicata, applies only to issues that were directly litigated and not to those which merely could have been litigated. *Lovell*, 719 F.2d at 1376. A fact established in prior litigation not by judicial resolution but by stipulation has not been "actually litigated" and thus is the proper subject of proof in subsequent proceedings. *Otherson v. Department of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983). A contrary rule, commentators reason, would discourage parties from compromising and narrowing issues because of the possible future preclusive effect of their decisions. See *id.* at 274-75 (quoting *Restatement (Second) of Judgments* § 27 comment e, at 256 (1982)). The present case illustrates this concern, since it appears that litigation in the Rule 41(e) proceeding of the corporate versus personal status of Young's bail bonding business would have resulted only in a technical change in the way Young identified himself in his motion. Cf. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4443, at 381-82 (1981) (issue not precluded by admission of facts in prior litigation through failure to deny opposing pleading "both because there has been no actual litigation or decision and because pleading maneuvers in one suit should not carry such consequences in other suits").

Young cannot avoid this rule regarding issues not controverted by invoking language that collateral estoppel applies even though little or no evidence is introduced on an issue framed by the pleadings.¹ See *id.* § 4420, at 178-81. The rules apply in factually distinct settings depending on whether or not the parties in the prior proceeding actually disputed the relevant points, and Young has not met his burden of proving that the court in the Rule 41(e) proceeding rendered its verdict upon a determination that Young's bail bonding business was a personal business. See *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *Oldham v. Pritchett*, 599 F.2d 274, 277 (8th Cir. 1979). We agree that the government was not barred by the doctrine of collateral estoppel from proving that the bail bonding income should have been reported on Young's corporate tax return.

Young next asserts that the income from the bail bonding business was included in his corporate return as net income, although not as gross income and that his corporate return thus was not "untruthful" within the contemplation of section 7206(1) but merely "incomplete." In a section 7206(1) prosecution, however, the government need not establish an actual tax deficiency. See *United States v. Ballard*, 535 F.2d 400, 404 (8th Cir.), *cert. denied*, 429 U.S. 918 (1976). A tax return that "omits material items necessary to the computation of income is not 'true and correct' within the meaning of section 7206." *Id.* at 403 (quoting *Siravo v. United States*, 377 F.2d 469, 472 (1st Cir. 1967)); see also *United States v. Greenberg*, 735 F.2d

¹ Our reasoning here also disposes of Young's argument that the government admitted the personal status of the bail operation when it referred in its petition for rehearing en banc to the "unincorporated bail bonding business." The government again was merely restating background information not in contention. Cf. *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (discussing limitations on the use as admissions of statements made at opening argument in prior proceedings).

29, 31 (2nd Cir. 1984) (function of section 7206(1) is in part to ensure that taxpayers not make statements that would hinder the government in verifying the accuracy of returns); *cf. United States v. Grabinski*, 727 F.2d 681, 686 (8th Cir. 1984) (validity of tax return under section 7203 depends on whether it gives the IRS sufficient information from which to calculate tax liability based on taxpayer's circumstances, including gross income). The district court did not err in instructing the jury that Young's alleged false statements pertaining to gross receipts, if proven beyond a reasonable doubt, were material as a matter of law and could be the basis for a section 7206(1) conviction.

Young contends that the district court erred in excluding testimony pertaining to the overall loss realized from the bail bonding business. Young called Mark Larson, a certified public accountant, as an expert witness to testify about exhibits he had compiled that allegedly showed that the total deposits to Corporation's bonding account were approximately the same amount that the government claimed was omitted from the 1980 corporate income tax return. The district court sustained the government's objection on the ground of lack of foundation.

The government argues that the district court properly excluded Larson's testimony on the ground of lack of foundation for the following reasons: (1) the offered calculation was not based on the fiscal tax year; (2) the bonding account was treated as a trust account with deposits treated as liabilities, rather than as income; (3) no income and expense analysis of the bonding account was made during the preparation of the corporate income tax return; (4) not all of the receipts from the bail bonding business were deposited into the bonding account; and (5) most of the withdrawals from the bonding account were simply "pass through" items, rather than expenses.

In *Hannah v. City of Overland*, 795 F.2d 1385, 1388-89 (8th Cir. 1986), the court held:

An appellant bears a heavy burden under the appellate standard of review of a district court's evidentiary rulings. Whether to admit or exclude testimony is committed to the sound discretion of the district court. This Court will reverse a district court's decision to exclude evidence only if the district court has abused its discretion. *United States v. Curnew*, 788 F.2d 1335, 1338 (8th Cir. 1986); *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 133 (8th Cir. 1985) ("Questions of relevancy are committed to the broad discretion of the trial court").

This standard of review applies to rulings on the admission of expert as well as lay testimony. *Smalley v. United States*, No. 85-2221, (8th Cir. Aug. 20, 1986); *United States v. Curnew*, 788 F.2d 1335, 1338 (8th Cir. 1986); *United States v. Tovar*, 687 F.2d 1210, 1215 (8th Cir. 1982).

When measured against this standard, the district court's refusal to admit the proffered testimony did not constitute reversible error. We note that this lengthy trial involved the admission of much documentary evidence, the relevance of which is not always immediately apparent from the cold pages of the record. We are satisfied that the trial court, permitting as it did extended argument by counsel on the admissibility of Larson's proposed testimony, was in a much better position than are we to rule on the question.

We have carefully considered all additional points raised by Young, and we find no reversible error.

The judgment of conviction is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 85-5211-ND

**United States of America,
Appellee,**

vs.

**Robert E. Young,
Appellant.**

**Appeal from the United States
District Court for the
District of North Dakota**

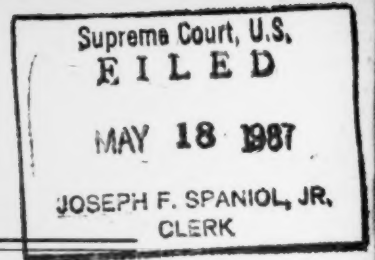
**Appellant's petition for rehearing en banc has been
considered by the Court and is denied.**

Petition for rehearing by the panel is also denied.

January 5, 1987

No. 86-1399

2



In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT E. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

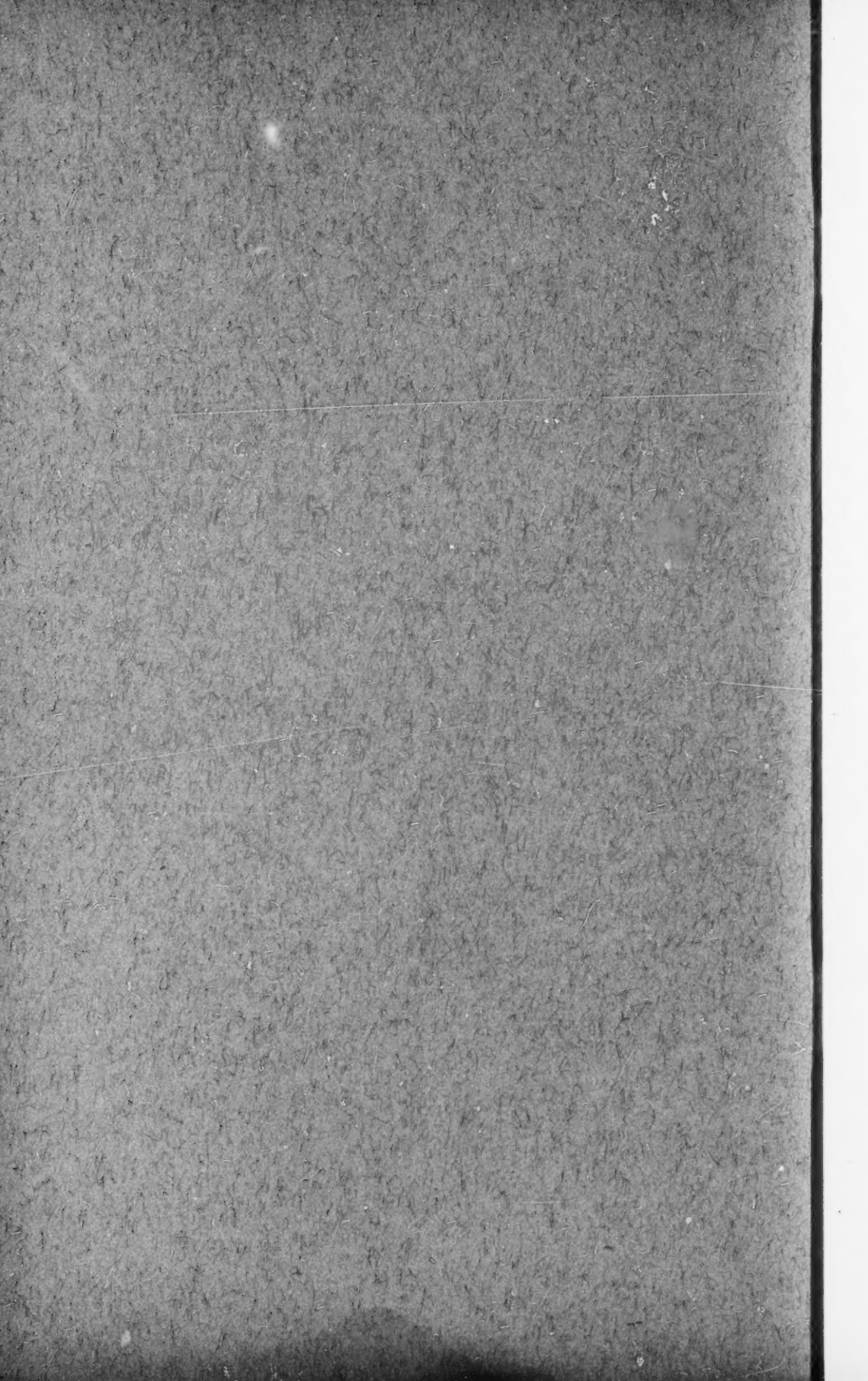
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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding certain expert testimony on the ground that an adequate foundation had not been laid for its admission.

2. Whether the district erred in instructing the jury that an understatement of gross receipts on an income tax return is a "material matter" within the meaning of 26 U.S.C. 7206(1).

3. Whether the district court erred in quashing a subpoena seeking to compel a government attorney to testify concerning a sentence contained in the statement of facts in a government brief in another case.

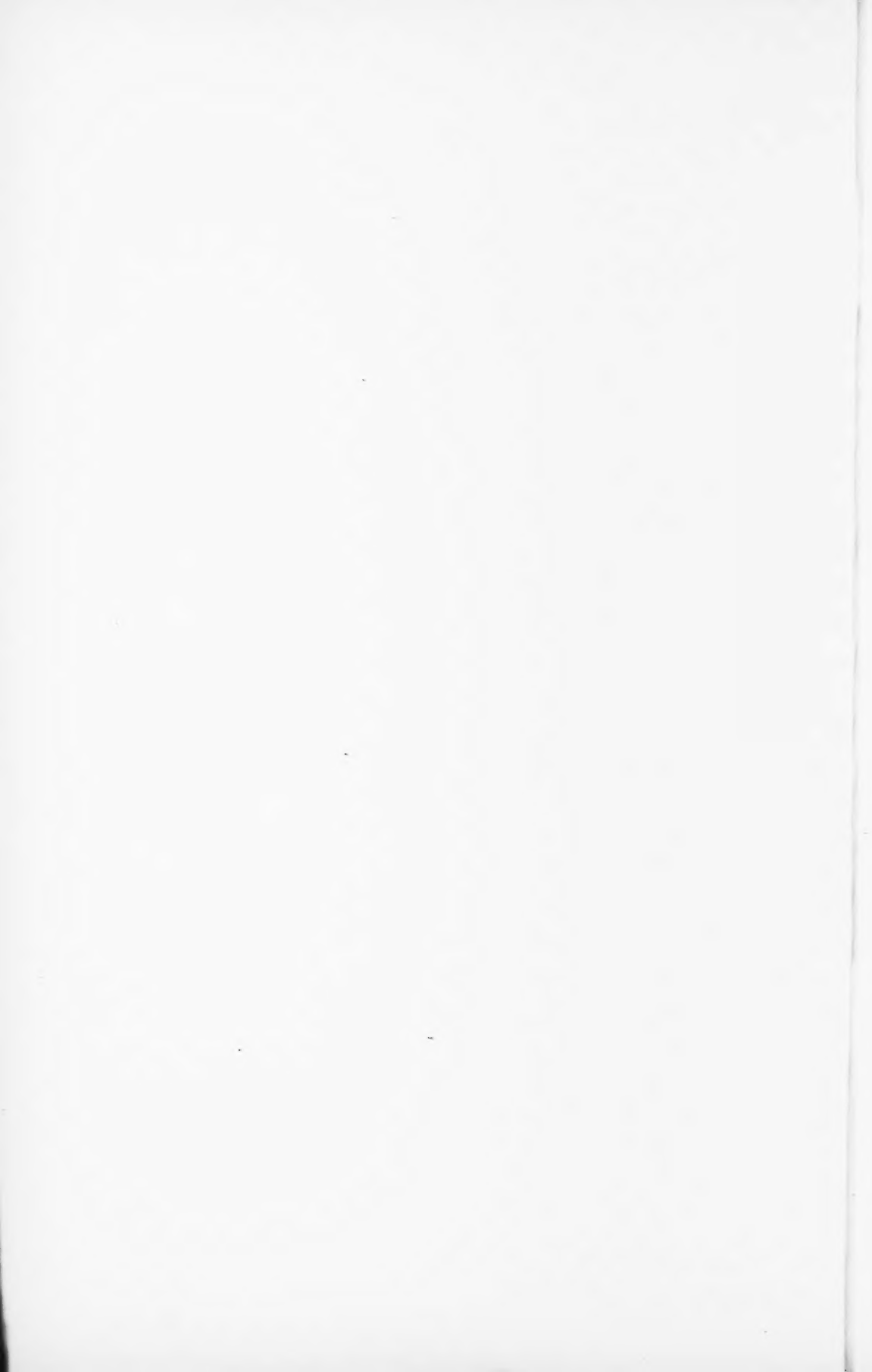


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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1399

ROBERT E. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 804 F.2d 116.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1986. A petition for rehearing was denied on January 5, 1987 (Pet. App. A8). The petition for a writ of certiorari was filed on February 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted on four counts of filing false corporate income tax returns for the years 1978 through 1981, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to one year's imprisonment and fined \$20,000. The court of appeals affirmed (Pet. App. A1-A7).

Petitioner is a businessman who, during the prosecution years, operated Bob Young Agency, Inc., a corporation owned by him and his wife (Tr. 54, 1187). The corporation included a general insurance agency, a real estate agency, and a bail bond business (Tr. 49-50, 1155). Evidence introduced at trial established that petitioner failed to report gross receipts in the amounts of \$86,977; \$107,055; \$120,633; and \$82,455, on the corporate tax returns for the four tax years at issue (GX 127; Tr. 923). The understatement resulted primarily from petitioner's failure to report income from the bail bond business (Tr. 770-771; GX 161).

Considerable evidence showed that petitioner knew that all the corporate income was not being reported. Although petitioner's net worth was increasing each year, substantial losses were being declared on both his personal and corporate tax returns (Tr. 1201-1202). Petitioner was personally involved in the operation of the bail bond business (Tr. 54-55, 120, 1205-1207), and he knew that all of the bonding income was not deposited in the bail bond account (Tr. 1227-1230). Instead, the bail bond income either was deposited in a personal account (Tr. 1228-1229), which was never furnished to the corporate tax return preparers (Tr. 661-666), or was simply unaccounted for. The bonding income was not reported on petitioner's personal income tax returns, and petitioner specifically told his personal tax return preparers that various income items from the bonding business need not be accounted for on his personal returns (Tr. 639-647, 820-833; GXs 59, 60, 61).

Petitioner's primary defense at trial was that the bail bond income constituted personal income and therefore need not have been declared on the corporate returns. This defense was submitted in the face of overwhelming evidence that the bail bond income constituted corporate income, including evidence that (1) agreements and other correspondence with various surety companies were signed using

the corporate name (GXs 21, 26, 28, 49, 50, 51, 56, 104-117); (2) the accountants who prepared the corporate returns and petitioner's personal returns understood, from their contacts with petitioner and his employees, that the bail bonding income was being accounted for on the corporate returns (Tr. 644-647, 662, 696, 832-833; GXs 62-66); (3) an employee who devoted most of her efforts to the bail bonding business was paid by the corporation (Tr. 92-93; GX 133); (4) petitioner stated to Internal Revenue Service agents that the bail bonding business was part of the corporation (Tr. 769, 862); and (5) petitioner indicated in various civil pleadings that the bail bonds constituted corporate activity (Tr. 1294-1295, 1301-1302; GXs 120, 121). Petitioner also argued that the gross receipts for the bail bonding business were reflected in a reported figure for "commissions" that allegedly "netted out" the gross receipts and expenses of the business.

ARGUMENT

1. Petitioner disputes (Pet. 8-9) the court of appeals' holding that the district court did not commit reversible error in refusing to admit certain expert testimony. The court of appeals' ruling was correct and does not warrant review by this Court.

At trial, petitioner attempted to introduce summary charts prepared by an accountant, which allegedly constituted an analysis of petitioner's bonding business bank account for the 1980 calendar year (Tr. 1245-1248, 1266-1268, 1279-1281). Petitioner asserted that the summary charts and the expert's proffered testimony would tend to prove that the bail bond business showed a net loss of approximately \$500 during that year and that the corporation's net income therefore was not understated (Tr. 1263). During voir dire examination of the witness, the government elicited testimony that the witness's analysis was based on the assumptions that the account was not a corporate

account, that most of the deposits constituted personal income, and that most of the checks written on the account constituted expenses (Tr. 1249-1250). The expert witness also testified that if the account had been treated as a trust account, as petitioner's corporate accountants testified that it should have been, his net figures would be incorrect (Tr. 1281-1284). Consequently, the government objected to the exhibits on the ground that petitioner had failed to lay a proper foundation to establish that the exhibits were relevant (Tr. 1250-1261, 1264-1265, 1268-1273, 1284-1285). The trial court sustained the government's objection (Tr. 1263-1265, 1274, 1285), and the court of appeals upheld that ruling (Pet. App. A7).

As petitioner acknowledges (Pet. 8), it is well established that a district court has broad discretion to determine the admissibility of evidence, and a reviewing court will reverse the district court's decision only upon a clear showing of abuse of discretion. See, e.g., *Hannch v. City of Overland*, 795 F.2d 1385, 1388-1389 (8th Cir. 1986). Petitioner does not seek to demonstrate that the district court abused its discretion; he makes no effort to rebut the difficulties with the proffered testimony that impelled the district court to reject it for lack of foundation. Rather, petitioner's objection is focused entirely on the adequacy of the inquiry made by the court of appeals. Petitioner asserts that the court of appeals "did not inquire into the relevancy of the offered testimony," but instead merely "deferred to the trial court" (Pet. 9). Accordingly, petitioner concludes that the result of the court's decision is that "a defendant in a criminal case simply has no chance for any significant review of evidentiary errors made in the court below" (*ibid.*). This contention is without merit.

In the court of appeals, the government made the following points in defense of the district court's order excluding the expert testimony (see Pet. App. A6). First, the calculations offered by petitioner's expert witness were not based

on the fiscal tax year, as were the corporate tax returns. Second, petitioner's corporate accountants viewed the account as a trust account; consequently, they treated deposits to the account as liabilities, rather than income, and they treated the withdrawals from the account as "pass through" items, rather than expenses (see Tr. 670-673, 694, 707-711). Third, the account was not used as a depository for all of the receipts from the bonding business (see Tr. 892-893, 1227-1230). The government further noted that the witness had acknowledged that his testimony would not be relevant if the account had been treated by petitioner's accountants as a trust account, which is what the evidence showed (Tr. 1281-1284).

The court of appeals reviewed these arguments together with petitioner's counterarguments and correctly concluded that the district court's decision excluding the evidence for lack of foundation "did not constitute reversible error" (Pet. App. A7).¹ The court noted in this connection that "the trial court * * * was in a much better position than [the court of appeals] to rule on the question [of admissibility]" (*ibid.*). Petitioner's criticism (Pet. 9) of this statement is unfounded; the statement represents no more than a

¹Because the court of appeals upheld the district court's ruling that there was no adequate foundation for the testimony in question, there was no reason for the court to "inquire into the relevancy of the offered testimony" (see Pet. 9). In any event, the evidence was not relevant. Petitioner was charged with failing to report gross receipts on his corporate return, primarily from his bail bond business. The primary defense that the bail bond business was not part of the corporation did not depend upon whether there was a loss from that business, as the expert proposed to testify. His testimony thus would not have aided the jury in resolving that issue. To the extent that the accountant's testimony was proffered to show that the corporate returns were essentially accurate even if the bail bonding business was part of the corporation, the testimony was meaningless, because the accountant analyzed the account on the basis of a calendar year, and the corporation used a fiscal year in calculating income.

recognition of the “well known rule” (Pet. 8) that a trial court’s decision to exclude evidence should be upheld in the absence of an abuse of discretion. Accordingly, neither the court of appeals’ holding nor anything in its opinion provides support for petitioner’s assertion that the decision eliminates any chance for a defendant to challenge a trial court’s evidentiary rulings.²

2. Petitioner also contends (Pet. 10-11) that the district court improperly instructed the jury with respect to the materiality of the false statements alleged in the indictment. This contention is also without merit, for several reasons.

The trial court instructed the jury that the materiality of the false statements alleged in the indictment was a question of law to be decided by the court. The court further instructed that the alleged false statements, if proved beyond a reasonable doubt, were material because “statements pertaining to the taxpayer’s gross receipts are essential for ascertaining or verifying the correctness of the tax declared in an income tax return” (Pet. 10). Petitioner argues that the court’s instruction was improper because it permits conviction under Section 7206(1) where a taxpayer does not report either gross receipts or expenses on a corporate income tax return, but accurately reports the “netted amount” elsewhere on the return.

²Petitioner asserts that the decision below conflicts with *United States v. McLaughlin*, 663 F.2d 949 (9th Cir. 1981), but that case is completely inapposite. In *McLaughlin*, the court of appeals reversed the trial court’s finding that proffered testimony regarding prior inconsistent statements failed to meet the express foundational prerequisites of Rule 613(b) of the Federal Rules of Evidence. The court of appeals held that the trial court had misinterpreted Rule 613(b) and that its foundational prerequisites could be satisfied simply by recalling the witness to give him an opportunity to explain the apparently inconsistent statements. That holding is quite irrelevant to the district court’s evidentiary ruling here, which turned on the defects in the assumptions underlying the proffered testimony. The decision below thus does not conflict in any way with *McLaughlin*.

Petitioner's argument fails on two counts. First, the court's instruction correctly stated the applicable law; it is well established that an understatement of gross receipts is a "material matter" within the meaning of Section 7206(1). Second, even if petitioner were correct that the example he sets forth at pages 10-11 of the petition does not involve a material misstatement, that example bears no resemblance to the facts here. There was ample evidence that petitioner intentionally failed to report all the gross receipts from his bail bond business and that petitioner's accountants had not simply "netted out" the gross income from the business. Thus, the false statements here were material under any standard.

a. Petitioner does not dispute the well-settled proposition that materiality under Section 7206(1) is a question of law to be decided by the court. See, e.g., *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984) (collecting cases); but see *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969). Furthermore, the courts of appeals have uniformly held that a misstatement of gross receipts is a "material matter" within the meaning of Section 7206(1). See *United States v. Greenberg*, *supra*; *United States v. Marabelles*, 724 F.2d 1374, 1380 (9th Cir. 1984); *United States v. Strand*, 617 F.2d 571, 574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); *United States v. Taylor*, 574 F.2d 232, 235-237 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States v. Ballard*, 535 F.2d 400 (8th Cir.), cert. denied, 429 U.S. 918 (1976); *United States v. Morse*, 491 F.2d 149 (1st Cir. 1974). Petitioner cites no case to the contrary. Thus, it is clear that the district court's instruction correctly stated the law.

Examination of the purpose of Section 7206(1) strongly supports the conclusion that a failure to list all gross receipts is material, even if the proper amount of taxable income appears elsewhere on the return. Section 7206(1)

seeks to ensure not only that a taxpayer pay the proper amount of taxes, but also "that the taxpayer not make misstatements that could hinder the Internal Revenue Service (IRS) in carrying out such functions as the verification of the accuracy of that return or a related tax return" (*United States v. Greenberg*, 735 F.2d at 31). To prove a violation of Section 7206(1), therefore, it is well established that the government is not required to prove either the intent to evade payment of taxes or the underpayment of any tax. See *United States v. Greenberg*, 735 F.2d at 31; *United States v. Gaines*, 690 F.2d 849, 858 (11th Cir. 1982); *United States v. Taylor*, 574 F.2d at 234; *United States v. Ballard*, *supra*; *United States v. Romanow*, 509 F.2d 26, 28 (1st Cir. 1975); *United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974). If petitioner genuinely believed that the return as a whole was substantially accurate because a "net" figure offsetting gross receipts and expenses was reported elsewhere, that would pertain to a possible defense of lack of willfulness, but it would be irrelevant to the issue of materiality. See *United States v. Taylor*, 574 F.2d at 237.

b. In any event, the record does not support petitioner's assertion that, even though he failed to report \$404,000 in gross receipts, the net income from his bail bonding business was correctly reported on his corporate tax returns. The evidence showed that petitioner's accountants handled the bail bond account as a trust account and did not "net out" the gross receipts from the bail bond business. The foundation of petitioner's argument—that deposits to the account constituted income and checks drawn on the account constituted expenses—was refuted by petitioner's corporate accountant, who testified that deposits to the account were treated as liabilities and withdrawals from the account were treated as reductions of liability. Accordingly, no figure reported on the returns reflected net income from the business. Moreover, the evidence showed that not all the

income from the bail bond business was deposited in the bail bond account. Thus, it is clear that petitioner's understatement of gross receipts was "material" under Section 7206(1).

3. Petitioner contends (Pet. 5-7, 11-12) that the district court erred by granting the government's motion to quash a subpoena issued to a Department of Justice attorney. This contention was correctly rejected by the court of appeals.

In a prior proceeding involving a search warrant issued for the office of petitioner's bail bonding business, *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983), the statement of facts in the government's petition for rehearing recited that "Appellant Young is the owner of an unincorporated bail bonding business." Petitioner sought to subpoena the government attorney who authored the petition to elicit this so-called "admission" that the bail bond business was personal, not corporate.

The district court clearly did not abuse its discretion in ruling that the testimony would be inadmissible and therefore quashing the subpoena. As the court of appeals explained (Pet. App. A2-A5), the corporate status of petitioner's business was not an issue that had been litigated in the prior proceeding, and the government in its petition "was merely restating background information not in contention" (Pet. App. A5 n.1). The statement therefore could not be regarded as a judicial admission on the part of the government with respect to that issue. In light of the abundant evidence establishing that the bail bond business was a corporate business, admitting the statement that petitioner sought to introduce would have served only to confuse the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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